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Letto-Vanamo, Pia Tellervo

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Legal education as a channel to the social elite

Pia Letto-Vanamo, University of Helsinki

1. Introduction

In the following, I will discuss university education of legal professionals as an example of training the socio-legal elite in the Western world. Moreover, the current tension in academia between natural sciences on the one hand and social sciences and humanities on the other hand, with its impact on legal education and legal scholarship will be touched upon. At the same time, the role of legal professionals as societal actors will be discussed, with Finland and the Nordic Countries as examples. The analysis starts at founding of the first university in Finland, in the 17th century, and ends up at current developments.

Three incidents or developments inspired me to write this chapter with a focus on university education in law. The first of these is a request by the Japanese Government to national universities to close faculties / departments of social sciences and humanities. The universities should produce “human resources that match the needs of society by accurately grasping changes in industrial structure and employment need”. At least 26 of Japan’s 60 universities will close faculties affected during 2016 or convert them to “areas that better meet society’s needs”. Hence, university education is being reoriented at the expense of “non-practical” or “non-useful” disciplines. However, discussion of useful – useless disciplines is not only a Japanese phenomenon but also well known in Northern Europe.

The second episode is from 2013: a proposal by US President Barrack Obama to cut a year off law school education. Education, especially at the elite law schools, is too expensive. The annual tuition fee at Harvard Law School is over 50, 000 US Dollars - mainly because of the professors’

salaries. These are, for instance, twice as high as those of US Supreme Court judges. In reaction to the proposal, two educational models seem to compete. Hence, the question is, whether the “most powerful elite” - at least in terms of Alexis de Tocqueville¹- should be trained by law schools or by trade schools. Actually, the tension between theoretical (/university) and practical education has characterized initiatives for reform of legal education for centuries, and is clearly seen also in Finnish university history. Moreover, it can be said that other similarities also exist between the USA and Finland: While the traditional nobility - even the classical bourgeoisie - was missing in these countries, the societal elite was formed by other groups, first and foremost by members of the legal profession.

The third developments are from my home university, the University of Helsinki, which is the oldest (founded in 1640) and biggest as well as the only university in the country that is still hosting all traditional faculties and disciplines. However, the question whether it is an elite university or not will be touched later in this chapter. Either way, the University stands today as 67th on the Shanghai List but is working hard to be among the 50 best.² Hence, competitiveness, efficiency and internationalization are key terms in the University’s strategy documents influencing resource allocation, even ranking between individual researchers.

2. University for civil servants

Studies in Nordic university history often emphasize more general phenomena such as “the late modernization” of societies or “the late formation” of professions and professional culture. Compared to many other European countries, the Nordic countries *are* late modernized, late urbanized and late industrialized. For a long time, big cities, their bourgeoisie and complicated economic transactions were missing. The Nordic Countries are also welfare (/social) states with free and equal access to school and university education, and because of the Nordic tax and social security policy (economic) differences between social groups are quite small. Besides, the Lutheran religion and close cooperation between the State and Church have played an important

¹ De La Démocratie en Amérique, 1835-1840.

² It can, however, be noted that when the positions of the Nordic universities in the international ranking lists are analysed in relation to numbers of inhabitants, the Nordic countries stand on the top of the ranking.

role in organizing the Nordic societies and their educational institutions.³ As with many other professions, the Nordic trained legal profession is a new phenomenon.

In Finland, the first university, the Royal Academy of Åbo (in Finnish: Turku), was founded by the Swedish Crown in the year 1640.⁴ The aim of founding the University was to educate local priests and civil servants. Priests, who needed to learn the Finnish language, were to contribute to civilizing the “Eastern land” of the Realm, and civil servants to its ‘Swedification’ as well as to centralization of the Royal administration. From the outset, courses in law were taught at the Academy, but the history of a university-trained legal profession starts as late as the 19th century.⁵ Before that, civil servants, even judges were recruited mostly from among Swedish noblemen, who were privileged to obtain the highest civil and military offices, so that legal knowledge was hardly needed. For a long time, the main fora in Finland for conflict resolution – and thus for discussions on law – were local peasant assemblies (called *ting*).

In 1809, Finland became an autonomous part of the Russian Empire, as the Grand Duchy of Finland.⁶ The Academy was renamed as Imperial Alexander University and moved to Helsinki⁷ in 1828. For the first time, Finland’s own administration was built up for the country. In spite of the autonomous position, the role of the Parliament (Estates) was either non-existent (1809-1863) or weak. Many legal reforms necessary for industrialization and modernization of legal institutions were realized through administrative decisions and court practice. Moreover, because of lack of democracy and constitutional guarantees, legalistic thinking (referring mainly to the Swedish 18th century fundamental and other laws that still were in force in Finland)⁸ and constitutional

³ See for instance Ditlev Tamm: The Faculty of Law. The teaching of law at the University of Copenhagen since 1479. Copenhagen: Museum Tusculanum 2010.

⁴ The country was part of Sweden until 1808; as to the history of the University of Helsinki, see Matti Klinge: A European University. The University of Helsinki 1640-2010, Helsinki: Otava 2010.

⁵ The 17th and 18th century Academy was mostly an institution for the education of priests. However, for other students, especially for sons of the (few) noble families, this early university was rather like a gymnasium where one could come at the age of 13-15 years for a general education in, e.g., Latin, philosophy, rhetoric, theology, law and fencing.

⁶ Until its independence in 1917, Finland belonged to the Russian Empire.

⁷ Helsinki became the new Capital of the country instead of Turku/Åbo in 1819.

⁸ Based on the promise (oath) of the Russian tsar that the Finns could retain their “old laws” (from the Swedish regime), their own languages (Finnish and Swedish) and the Lutheran religion.

dogmatics became important, too. It can be said that the key players of society became high officials,⁹ including appellate court judges.¹⁰ Thus, civil servants, who formed the largest part of the societal elite, powered 19th century Finland.¹¹

Towards the end of the 19th century, the number of Finnish-speaking¹² university students also increased. They came through the newly founded Finnish-speaking gymnasiums, and often from families of the so-called “third estate” but with a peasant background, as well. More generally, the University of Helsinki formed one of the main foundations of the essence of the Grand Duchy¹³ and the formation of the Finnish nation: When national identity, language policy, journalism, economic or parliamentary activities were concerned, the University professors were involved. In this context such professors as philosopher, statesman and founding father of the Finnish currency (*markka*) Johan Vilhem Snellman (1806-1881) and physician, philologist and collector of the *Kalevala*, the national epic of Finland, Elias Lönnroth (1802-1884) should be mentioned.

At the same time, the University followed the Russian educational ideal of promoting professional and civil servant education. A university education in law became an important channel to the Finnish societal elite. Since 1828 civil servants needed to have a university degree.¹⁴ A degree in law was the only one that guaranteed access to all state offices. From those days on, the law faculty at the University of Helsinki has been the most important institution in the country for

⁹ Some of them were former Swedish army officers who became “unemployed” when Finland was attached to the Russian Empire.

¹⁰ During the period of Russian rule (1809–1917), supreme jurisdiction in Finland was exercised by the Governing Council, later renamed as the Senate. Thus, judicial affairs were dealt with by one of the senate divisions, the Judicial Division, which indicates that no clear separation of powers was in effect in Finland at that time. The independent highest instance, that is, the Supreme Court, was established in 1918.

¹¹ See for more detail Jorma Selovuori (ed.): *Power and bureaucracy in Finland 1809-1998*, Helsinki: Edita 1999.

¹² For a long time (only) the Swedish language was used as the sole administrative and judicial language. Finnish became the official language of the country in 1863, and the administrative language at the University in 1903. Since 1863 Finland has had two official languages: Swedish and Finnish. However, today only 9 % of the population speaks Swedish as their first language. The only bilingual university in the Country is (still) the University of Helsinki, which has, e.g., a yearly quota for Swedish-speaking students in law as one of the acts of protection of the linguistic minority guaranteed in the Constitution of Finland.

¹³ A demonstration of the exceptional policy of the Russian tsar towards Finland.

¹⁴ Letto-Vanamo: *Juristische Fakultät als Beamtenschule*, in J. Eckert and K.Å Modeér (ed.): *Juristische Fakultäten und Juristenausbildung im Ostseeraum*, Stockholm: Institutet för rätthistorik forskning 20014, 63-71. For developments in other Nordic countries see articles by other authors in the volume concerned.

educating not only civil servants but also judges for local and higher courts. However, it has also educated practicing lawyers (solicitors, advocates) and legal academics.¹⁵ It is the university¹⁶ – not the State (as e.g. in Germany), the Bar, or an “academy for judges” – that provides the basic qualification for the legal professions. Here, one can easily find reasons why discussions on university education in law and its reforms so often reflect the dilemma between the ideal of professional training and that of a more general, academic education.

This dilemma came clearly to the fore, for instance, in the 1970s when the Finnish school system¹⁷ and university education were reformed. During that decade, “democratization” of educational systems was insisted upon and the “too narrow” social background of the judges criticized.¹⁸ Moreover, the subject of studies in law was slightly reformed through discussions about approximating legal science to other social sciences. Still, the practical and professional nature of legal education, covering all central fields of law, remained. However, current changes in the university funding system with an assessment culture as well as the internationalization of legal orders, discussed later in this chapter, have put the traditional, national scope of legal studies under question.

As noted earlier, it is not easy to speak in economic terms of an elite in Finland or in other Nordic countries – and even less so in Finland than elsewhere. Be that as it may, the faculty of law at the University of Helsinki could (still) be seen as an elite institution taking in yearly around 250 students, which is roughly 10 % of applicants, selected through an entrance exam. The students

¹⁵ Later, the great majority of the Presidents of the Republic have been with a university degree in law.

¹⁶ Since the middle of the 20th century, more universities have been founded. At the moment, graduation in law is possible at four of them (at the Universities of, respectively, Helsinki, Eastern Finland [in Joensuu], Lapland [in Rovaniemi], and Turku) .

¹⁷ Since then, Finland has had a general, well-functioning primary school system.

¹⁸ Judges seemed socially and politically distanced from citizens, which gave rise to a lack of trust in the courts. Concrete changes in the recruitment base began with the changeover to a salary system and with the establishment of the position of district judges. Ever since the 1970s, the number of first instance judges has increased considerably, and at the same time, the proportion of women in the judiciary has begun to rise. In 1950, the Finnish judiciary consisted of 557 judges, 45 of whom were women. In 1970, the corresponding numbers were 699 and 84. And according to the statistics for 1990, the numbers had grown to 1,981 and 914. On the Finnish judiciary see further Letto-Vanamo: Finnish Judges between Tradition and Dynamism. In Sophie Turenne: Fair Reflection of Society in Judicial Systems – A Comparative Study, Cham: Springer 2015, 157-167.

are highly motivated, and do not quit their studies. They come from middle class (civil service) families and from the best high schools in the country, and after finishing their studies obtain the best jobs in the public or private sectors.¹⁹

At the same time, the university education - as at the other Nordic universities – is free, paid by the public purse and, as already stated, gives basic competence to all branches of the legal profession.²⁰ Also in more general terms, the symbolic self-differentiation of Finns – unlike that of, for example, the French – is not linked to the formation of social classes over time or to any concomitant values or conceptions. In contrast, the protestant work ethic, a kind of pioneer spirit, has been important for defining commonly accepted and desired values. This is not to say, however, that Finnish law professionals would not be clearly a part of the middle class, characterised by expertise gained through education, and enjoying a highly respected and legitimate status as a part of the community. It is not uncommon that the profession of law is 'inherited'; it is only very seldom that a legal professional would have a working class background.

3. University scholars as legal actors

In all Nordic countries, modern national legal scholarship²¹ was born as late as during the 19th Century, although in Denmark a little earlier than elsewhere. Inspiration was taken foremost from German scholars. For instance in Finland, the first text book on civil law, written (in Swedish) by Robert Montgomery²² was partly a direct translation of Bernhard Windscheid's "Lehrbuch des

¹⁹ Currently, over 50 % of law students will obtain work in the private sector: in law firms and private companies.

²⁰ For judges' qualifications, see Section 102 of the Constitution of Finland, and Section 2 of the Act on Judicial Appointments. Thus, the applicant must be a "righteous Finnish citizen who has earned a Master's degree in law and who by his or her previous activity in a court of law or elsewhere has demonstrated the professional competence and the personal characteristics necessary for successful performance of the duties inherent in the position". Membership of the Finnish Bar Association requires a Master's degree in law, the (Finnish) Bar exam and two years' practice in a law firm.

²¹ For a history of legal scholarship in the Nordic Countries, see esp. Lars Björne: *Den konstruktiva riktningen – Den nordiska rättsvetenskapens historia, Del III, 1871–1910*, Lund: Institutet för rättshistorisk forskning, 2002 and Björne: *Realism och skandinavisk realism – Den nordiska rättsvetenskapens historia, Del IV, 1911–1950*, Lund: Institutet för rättshistorisk forskning, 2007.

²² Montgomery: *Handbok i Finlands allmänna privaträtt I*, Helsinki 1889; Windscheid: *Lehrbuch des Pandektenrechts I*, Düsseldorf 1862. The influence of Windscheid can also be seen in Denmark e.g. in Julius Lassen: *Obligationsretten. Almindelig del*, Copenhagen: Gad, 1892.

Pandektenrechts".²³ Additionally, theoretical impacts, especially those of Conceptual Jurisprudence (*Begriffsjurisprudenz*) were German, but only until the 1920s. Since then, ideas from (Scandinavian) Realism²⁴ have dominated legal thinking and judicial argumentation in the North. Courts refer to so-called real considerations (in Swedish: *reella överväganden*), and respect *travaux préparatoires* as legal sources. The realistic approach, together with general democratization tendencies, led for instance to reforms of legal procedure and the Swedish court system in 1948²⁵ while similar reforms in Finland were realized as late as the 1990s.

Finland, however, has been an exception in this development: The German influence, especially Conceptual Jurisprudence, lasted much longer. This was superseded by the ideas of the Analytic School²⁶ as late as the 1950s. Reasons for this "exceptionalism" can be found in the country's political history. During the Russian era, when Swedish legislation could still be kept in force, legalistic ideology played an important role²⁷, and because of the absence of democracy, law and legal institutions were reformed not only by administrative and court decisions, but also with the active role of the (few) scholars in law²⁸. For instance, the first professorship in the Nordic countries solely for administrative law was founded at the University of Helsinki in 1907. Central topics of the discipline were, and still are, the principle of the rule of law and its interpretations.

²³ In other fields of law, too, an orientation towards Germany was common. The early civil law doctrine (e.g. by Montgomery) was influenced by the German pandect literature. The founding father of Finnish procedural law, Rabbe Axel Wrede, adopted ideas mainly from the Germans Oskar Bülow and Adolf Wach. However, interest in German legal science was not only a Finnish phenomenon. It is well known that German legal literature inspired legal professionals in many other European countries, too. A Finnish phenomenon, however, is that this influence was both long lasting and quite one-dimensional.

²⁴ The first critical remarks against "constructivist orientation" in Sweden are from the first decades of the 20th century. In this context especially, such names as Axel Hägerström, Vilhelm Lundstedt, and Carl Olivecrona, and the so called Uppsala School should be mentioned, while the Danish Alf Ross and his "Realistic doctrine of legal sources" cannot be forgotten.

²⁵ See further Kjell Åke Modéer: Den stora reformen: rättegångsbalkens förebilder och förverkligande. Svensk juristtidning 1999, 400-427.

²⁶ The domination of *Begriffsjurisprudenz* diminished in Finland above all through the influence of the Analytic School of law. These were closely connected to the Finnish philosophy of the 1960s and 1970s (e.g. G.H. von Wright and Jaakko Hintikka), which was strongly influenced by Anglo-American analytic philosophy. "Analytic" criticism focused mainly against "conclusions from concepts". But concepts were not neglected. They played a heuristic role – they were necessary for clarifying and classifying legal problems.

²⁷ The legalistic approach was typical especially during the last two decades of the Russian era because of the Russification proposals of the Empire, heavily opposed e.g. by Finnish appellate court judges and law professors.

²⁸ Actually, many of them were also actively in politics as members of the Government (Senate) or the Parliament (Estate) - R.A. Wrede, mentioned in fn 23, is a good example.

An important model for Finnish doctrine was the German literature discussing the concept of the *Rechtsstaat* and the principle of legality.

During the turbulent first decades of independence (from 1917), the autonomous²⁹ and apolitical role of the law was pointed out – while discussions among Realists³⁰ on criminality and property or on the role of the courts did not gain a hold. Thus, it is quite common to maintain that Conceptual Jurisprudence with the idea of autonomous legal science was the most influential doctrine in Finland until the 1950s. Generally speaking, the analytic turn in Finland after World War II can be seen as a reflection of social changes, but also of efforts by legal scholars towards concepts which could serve the interests of trade and business better than the old ones. Nevertheless, positive law was analysed through logical conceptual methods, in spite of the common understanding that the content of legal norms is (also) influenced by the socio-economic environment, and *vice versa*.

Many crucial changes in Finnish society can be dated to as late as the 1970s. Then it became possible to speak of a welfare (social) state with the idea of the active role of the “good state”. The decade is characterised by various democratization and modernisation processes: as we have seen, the school system and university education were reformed.³¹ Not only was approximation of legal studies to other social sciences required but also trends in legal research changed,³² as can be seen, for instance, in dissertations and in other academic works where the social dimension of law was pointed out. Here, especially³³, should be mentioned texts by Lars D. Eriksson inspired by Marxist theory and the Italian School “*L’uso alternativo del diritto*”.

²⁹ According to Björne, conceptual jurisprudence and its “apolitical” nature and its self-referential notion of legal science fitted very well with the political and social climate in Finland – first with the Era of Autonomy’s orientation towards legalistic thinking, and then with the politically sensitive circumstances after the Civil War of 1918; Lars Björne: *Realism och skandinavisk realism. Den nordiska rättsvetenskapens historia. Del IV*, Lund: Institutet för rättshistorisk forskning 2007, 224.

³⁰ See e.g. Toni Malminen: *So You Thought Transplanting Law is Easy? Fear of Scandinavian Legal Realism in Finland 1918-1965*. In: *Nordic Law – Between Tradition and Dynamism*, ed. by Husa et al. Cambridge: Intersentia 2007, 75-88.

³¹ On legal reforms of the 1970s see further Pia Letto-Vanamo and Timo Honkanen: *Lain nojalla, kansan tuelle. Moments of Finnish Justice in the 1970s*, Helsinki: Edita 2005.

³² The number of professors and other researchers in law has also heavily increased since the end of the 1960s.

³³ Lars D. Eriksson: *Marxistisk teori och rättsvetenskap*. Helsinki: Juridica 1980.

Regardless of criticism, the Analytic School preserved its importance in Finnish legal scholarship. Today, however, legal principles have become important, but concepts are still in use: they prepare the way for principles-based legal argumentation. From a comparative perspective it is also possible to say that, in spite of certain reorientations, legal science (legal scholarship) retains an exceptionally strong position in the country's legal life. Even "critical" Finnish legal scholars share the view of three equally powerful legal actors (the legislator, the judiciary, and legal scholarship), and the *ethos* of the active role of legal scholarship as a means of changing law and society.³⁴ In particular, so-called general doctrines (in German: *allgemeine Lehren*) of law are important. General doctrines, i.e. the central concepts and principles of various legal fields of law, also stand at the core of Finnish legal education and legal thinking. They define the identity of particular legal fields or disciplines, and possibilities for a new legal field are combined with possibilities to discover and develop own concepts and principles.³⁵

4. Towards a new elite?

Even today, a degree in law is the most "useful" and – just because of it – perhaps the most respected university degree in Finland, although legal professionals participate in State politics more seldom than before.³⁶ At the same time, legal scholarship plays an important role in discussion and implementation of legal and societal reforms³⁷. One example of the scholarly influence can be found in the work of the Constitutional Committee of the Finnish Parliament. In constitutional monitoring of new legislation, the Committee plays a central role while its opinions are drafted on the basis of hearing leading university professors specialized in constitutional law.³⁸ Still, the difference from the power of law professionals in the USA is remarkable: In Finland, as in the other Nordic countries, the legal sphere is more limited, and the borderline between politics and law quite strict. For instance, in Finland fundamental questions of same sex marriage or

³⁴ See Letto-Vanamo: Meaning(s) of Social Justice in the Nordic Countries. In: Hans Micklitz (ed.): The Many Meanings of Social Justice in European private law, Cheltenham: Edward Elgar Publishing 2011, 257-276.

³⁵ See especially Kaarlo Tuori: Critical Legal Positivism. Aldershot: Ashgate 2002.

³⁶ Respect is also quite high in the other Nordic Countries.

³⁷ However, law professors and even other legal professionals are very seldom seen today as members of the Finnish Parliament.

³⁸ On constitutional review in Finland, see e.g. Juha Lavapuro, Tuomas Ojanen and Martin Scheinin: Rights-based constitutionalism in Finland and the development of pluralist constitutional review. International Journal of Constitutional Law 2011, 505-531.

abortion, decided by the US Supreme Court, belong foremost to political debate, and are decided by the legislator (the Parliament).

At any rate, law as an academic discipline is changing. Legal regulation is not losing its importance, and jurists are still needed. However, especially the so-called Europeanization of law – all Nordic countries have ratified the European Convention on Human Rights, and Denmark, Finland and Sweden are members of the European Union (EU) – is both questioning the traditional, national approach of legal scholarship and changing legal practice, too. At most universities, law is still taught in national languages, and the main focus of training lies on the application of national law. At the same time, the daily work of many legal professionals has changed. Even judges ought to use foreign languages and be familiar with legal sources other than from their own country. Moreover, Nordic legal professionals are also involved in cross border (economic and other) activities, and compete for positions in “global lawyering” (in international institutions, arbitration, consultations, etc.).

At the same time, new ideals of university education and academic research are affecting law faculties, not only in Japan or in the USA, but also in Europe. One of the main ideals of university work today is effectiveness, measured foremost by the number of (internationally highly ranked, peer reviewed) publications, with impact factors and citation indexes. At the same time, the success of a discipline or an individual professor is evaluated through the amount of external (non-university) funding and the intensity of international networking. The assessment culture together with the internationalization of legal regulation has also intensified the dominance of the English language as the *lingua franca* at the Nordic universities, even in law.

At the University of Helsinki, one half of the doctoral works in law are today written in English and published as articles or monographs by a foreign / international publisher. This happens in legal fields that are by nature international such as international law, European law or legal theory, but also in traditionally more national fields such as criminal or family law. At the same time, students are intensively participating in European exchange programs and more often obtaining law degrees (in English) abroad.

Thus, one could ask whether the traditional, national elite is losing its prestige within Finnish society, or is at least one part of it becoming even more powerful through activities in the international forefront. In any case, there is an international group of university professors and other academics, including Finnish scholars³⁹, that takes part in discussions on developments in European Union law and on more general issues of legal harmonization and transnational law. In those cases, the main language of communication is English. However, despite the legal cultural importance of the language, English seems neither to change national legal systems towards the English common law nor to increase convergence between the European legal families⁴⁰. Moreover, legal scholars from Germany or France or from other countries with a “world language” are still intensively using their own languages. Interestingly, “international” or common-European discussion in English is dominated not only by scholars from English speaking countries but also including an active group of scholars from countries with minor languages.⁴¹

Nevertheless, a university education in law still guarantees access to an elite powering the most important State institutions - and the position of a legal scholar to discussions with other legal actors. Nevertheless, changes both within the legal system and in university culture are challenging the elite’s position. Thus, the balance between the practical / useful and the theoretical / “useless” in education and between national and international orientation should be taken into consideration. It is not only the country’s (legal) history or the glory of the first university that enables writing about the legal profession as the leading elite group in Finnish society - in the future as well.

³⁹ This also concerns Finnish scholars in International law, comparative law, legal history and legal theory.

⁴⁰ Here, at least the common law family and the continental-European civil law family should be mentioned.

⁴¹ See further Bruno De Witte: European Union Law: A Unified Academic Discipline? In Antoine Vauchez - Bruno de Witte (eds): *Lawyering Europe. European Law as a Transnational Social Field* Oxford: Hart Publishing 2013, 101-116.